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No. 82-342

In the

Supreme Court of the United States

OCTOBER TERM, 1982

PHILKO AVIATION, INC.,
Petitioner,

vs.

MAURICE SHACKET and SYLVIA SHACKET,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Because the "Question Presented" in the Petition for Writ of Certiorari and repeated by the petitioner and *amicus curiae* in their briefs does not fully or fairly state the issue presented in this case, respondents submit the following formulation of the question for review:

> Whether a prior bona fide purchaser of an aircraft with possession whose ownership interest, because of fraud by the seller, is not recorded with the Federal Aviation Agency pursuant to Section 503 of the Federal Aviation Act has a superior right to a subsequent purchaser with an interest voidable under applicable state law who records under Section 503.

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BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

A. Background

In April of 1978, Roger Smith Aircraft Sales, Inc. ("Smith Aircraft"), an aircraft dealership located in DuPage County, Illinois, sold a new, custom-built Piper Navajo aircraft to the respondents, Maurice and Sylvia

Shacket ("Shackets"). 497 F. Supp. at 1263.[1] The Shackets took possession of their aircraft at the time of the sale but did not record the original bill of sale with the Federal Aviation Administration ("FAA") on the understanding that Smith Aircraft would do so. *Id.* at 1264. Shortly thereafter, Smith Aircraft purported to sell the same aircraft to the petitioner, Philko Aviation, Inc. ("Philko"), a company related to Smith Aircraft. The purported sale to Philko was financed by the Sandwich State Bank ("Bank") which purported to acquire a security interest in the Shackets' aircraft. *Id.* at 1265.

Philko has never had possession of the aircraft nor did it contemplate obtaining possession since the sole purpose of its purported purchase of the aircraft was a credit transaction to accomodate Smith Aircraft. *Id.* at 1269-1270. Smith Aircraft claimed to have a buyer, Krueger Aviation ("Krueger"), for the aircraft but did not have sufficient funds or credit to complete the purchase in the first instance from the Piper franchise dealer, Clark Aviation ("Clark"). *Id.* at 1264-1265. Thus, Philko obtained a loan from the Bank in order to provide Smith Aircraft with the necessary funds to purchase the aircraft from Clark. The anticipated sale to Krueger, of

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[1] References to the facts herein are primarily made to the decision by the District Court below (497 F. Supp. 1262) which contains a detailed recitation of the facts. The Circuit Court expressly affirmed the District Court's ruling that there were no material facts in dispute, a ruling which was not challenged by the petitioner and is not before this Court. 681 F.2d at 531. Where reference to a specific deposition transcript is required respondents adopt the abbreviated references used by the petitioner (Brief For Petitioner, p. 3 n. 1).

course, did not take place but was merely part of Smith Aircraft's fraudulent scheme to sell the same aircraft to multiple buyers. *Id.* at 1263.

Upon learning of the interests claimed by Philko and the Bank in their aircraft as a result of Smith Aircraft's fraud, the Shackets filed an action for declaratory judgment regarding the ownership rights to the aircraft. On cross motions for summary judgment the United States District Court for the Northern District of Illinois granted summary judgment in favor of the Shackets, declaring that they own their aircraft free of any claims of Philko or the Bank. *Id.* On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's judgment. 681 F.2d 506.

B. The First Sale To The Shackets

In 1977 Maurice Shacket, a private pilot and owner of a small aircraft for several years, and his wife, Sylvia, contracted to purchase a custom-built Piper Navajo airplane for $126,000 together with the trade-in of the Shackets' current plane valued at $120,000. 497 F. Supp. at 1264. The Shackets paid Smith Aircraft $20,000 as a down payment upon signing the purchase contract. *Id.*

Smith Aircraft then contracted to obtain the aircraft from Clark. The Shackets were aware of the arrangements between Smith Aircraft and Clark, the area Piper franchisee, and, indeed, were in direct contact with Clark regarding customizing their aircraft before final delivery. *Id* .

Prior to closing on the new aircraft, Smith Aircraft found a buyer for the Shackets' trade-in. The Shackets

accordingly relinquished possession of their used airplane, retaining the title papers as security until the completion of the customizing, and concomitant closing, on their new plane. *Id.*

At the closing on April 18, 1978, the Shackets endorsed and delivered to Smith Aircraft two cashiers' checks, aggregating $106,000. However, because the Shackets were aware that Clark had certain financial problems with Smith Aircraft and requested to have a representative at the Shackets' closing, the Shackets did not tender the $106,000 to Smith Aircraft until after the Clark representative responded affirmatively to the Shackets' direct inquiry with respect to whether it was acceptable to close the purchase transaction. *Id.* The Clark representative then proceeded to show the Shackets the aircraft and gave them various manuals, the certificate of airworthiness, and the keys. *Id.*

At the closing, however, Roger Smith ("Smith"), the president of Smith Aircraft, failed to give the Shackets all of the proper bills of sale reflecting the entire chain of title to the aircraft. *Id.* Rather, Smith advised the Shackets that additional clerical work needed to be completed. He therefore supplied the Shackets with only the purchaser's copy of the bill of sale from Smith Aircraft to the Shackets and photocopies of the prior bills of sale relating to the earlier transfers from Piper to Clark and Clark to Smith Aircraft. *Id.* Smith assured the Shackets that he would "take care of the paperwork", which the Shackets understood to include the recordation of the original bills of sale with the FAA. *Id.* Following the closing, the Shackets flew their new aircraft home to Detroit and have retained possession ever since. *Id.*

Smith did not complete the "paperwork" as promised and the original bills of sale were not recorded with the FAA.

C. The Purported Second Sale To Philko

On April 20, 1978, only two days after the closing and delivery of the aircraft to the Shackets, Smith began to arrange the purported second sale of the same aircraft to Philko. Unlike the Shackets, Philko did not first learn of Smith Aircraft by an advertising flyer. *Id.* at 1265. Rather, Philko is a corporation which was acquired by Edward McArdle ("McArdle") in 1977 at the suggestion of Smith and has numerous business relationships with Smith Aircraft. The backdrop to the Smith Aircraft/Philko relationship is as follows.

In 1977 Smith, who desired to expand his business operations, learned that a corporation which was the lessee of all aircraft operations at the Aurora Airport (Philko's predecessor) was for sale. *Id.* Smith lacked the financial capability to acquire the corporation and, therefore, approached McArdle for financial assistance, proposing that McArdle purchase the corporation and sublease its airport operations to Smith Aircraft. *Id.*

McArdle agreed, purchased the corporation, and merged it with one of his other corporations to create Philko. Pursuant to Smith's proposal Philko then subleased the airport to Smith Aircraft. The sublease arrangement between Philko and Smith Aircraft became more than the conventional lessor-lessee relationship since Smith Aircraft agreed to perform, *inter alia*, all obligations imposed on Philko as lessee to the City of Aurora. McArdle and Smith further contracted to conduct several related businesses, in Philko's name but performed by

Smith Aircraft, including the operation of a flight school, rendering maintenance services, and sales of new Piper aircraft. *Id.*

Additionally, during 1977 McArdle assisted Smith Aircraft in at least two major financing transactions: (1) a guaranty of $100,000 of Smith Aircraft's $500,000 bank line of credit; and (2) a loan of $800,000 made in December of 1977. *Id.* at 1266. Finally, in late 1977 McArdle proposed to purchase the stock of Smith Aircraft and Philko paid a $5000 advance for this potential stock purchase. That transaction, however, was not consummated and the payment returned to McArdle. *Id.*

It was, therefore, in this context that Smith approached McArdle regarding the "sale" of the Shackets' aircraft. On April 20, 1978, Smith told McArdle that Smith Aircraft had contracted to purchase a new Piper Navajo from Clark (in fact, the same plane the Shackets had purchased two days earlier and flown to Detroit) for which Smith Aircraft had already contracted to resell to a third party in California, Krueger. *Id.* at 1264. According to what Smith told McArdle, Smith was unable to obtain the additional $152,000 necessary to complete the purchase from Clark. Thus, if Philko would obtain a bank loan to advance the funds Smith would repay the Philko bank loan from the proceeds of the Krueger sale. *Id.* at 1265. In addition, $60,000 of the Krueger proceeds would be applied to the remaining sum due Philko on the $80,000 loan Philko had previously made to Smith Aircraft. McArdle further understood from Smith that any balance from the Krueger proceeds would belong to Smith Aircraft. *Id.*

After examining the original prior bills of sale, McArdle and the Bank agreed to have Philko take title to

the aircraft so that it, in turn, could obtain the $152,000 loan from the Bank which would take a security interest in the aircraft. *Id.* McArdle and the Bank were also advised by Smith that the aircraft was not currently in the possession of Smith Aircraft but located at a Piper dealership in Michigan where it was being equipped with certain electronic equipment. *Id.* Neither McArdle nor the Bank took any action to confirm Smith's representations as to the location of the aircraft and that Krueger had agreed to purchase the aircraft. Similarly, no inquiry was made of Smith as to how he had obtained the original bills of sale without having paid Clark the $152,000. (R. EM Dep. 62-69; RA Dep. 21, 40)

On April 21, three days following the Shackets' closing and three days prior to the closing on the purported Philko sale, the Bank conducted a document search on the aircraft with the FAA which revealed that the aircraft was as yet unregistered. (R. RA Dep. 109-110) On April 24, Smith attended his second closing within a week for the sale of the same aircraft, an aircraft which was then in the possession of the first purchasers, the Shackets. 497 F. Supp. at 1262. At this closing, unlike the first, Smith presented and delivered the original bills of sale to the Bank representative. *Id.* The Bank, however, did not initiate a recording of those instruments immediately after the closing but rather, mailed them to the FAA on May 25, over thirty days later. (R. RA Dep. 130-35) Accordingly, the bills of sale were not filed with the FAA until May 31. (App. to Petition, E 41a) Almost two weeks later, on June 13, the FAA recorded the instruments to show that Philko was the registered owner of the aircraft and that the Bank held a security interest for the $152,000 it loaned to Philko. (App. to Petition, E 41a-44a)

D. The Decisions In The Lower Courts

On September 22, 1980 Judge Milton I. Shadur of the United States District Court for the Northern District of Illinois granted summary judgment in favor of the Shackets. In reaching that determination the District Court first found that no genuine issues as to any material fact existed. In the application of those undisputed facts to the law Judge Shadur held that: (1) the Shackets were good faith purchasers of the aircraft from Smith Aircraft; (2) Philko was not a good faith purchaser; (3) the "sale" to Philko was, at most, a credit transaction, granting Philko a security interest in the aircraft; (4) the federal recording provisions of the Federal Aviation Act preempt only state aircraft recording or registration laws and do not override state law principles governing priorities among conflicting interests; and (5) under the applicable state law principles, the prior unrecorded interest of the Shackets as good faith purchasers was superior to the subsequent recorded security interest of Philko.

On appeal to the Seventh Circuit the District Court's summary judgment in favor of the Shackets was affirmed. In the opinion, Chief Judge Howard T. Markey[2] concluded that: (1) the District Court correctly found that there was no genuine issue of material fact; (2) the District Court's ruling that state law governs the validity of the transfers of aircraft was correct; (3) the Shackets did obtain valid title to the aircraft as bona fide purchasers under applicable state law; and (4) Philko

[2] Chief Judge Markey, Chief Judge of the United States Court of Customs and Patent Appeals, was sitting by designation.

acquired no title or interest in the aircraft from Smith Aircraft under applicable state law.

SUMMARY OF ARGUMENT

Petitioner seeks to have this Court construe Section 503 of the Federal Aviation Act in such a manner that the mere recording of a purported instrument of conveyance validates that purported interest in the aircraft irrespective of an inherent invalidity in the underlying transaction. In other words, the petitioner argues that an unrecorded ownership interest in an aircraft conveyed prior in time to a recorded instrument can never be superior to the holder of the subsequent instrument even if the subsequent conveyance was invalid.

Respondents respectfully submit that such a construction which, in effect, equates nonrecording of an instrument with its invalidity, is: (1) contrary to the goals and purposes of the recording provisions of the Federal Aviation Act; (2) not supported by an objective reading of the relevant statutory language or the legislative history; and (3) would result in anomalous and irrational results. In contrast, construing Section 503 as preempting state law only as to state recording statutes and not with respect to the substantive validity of title or ownership interests and priorities is perfectly consistent with the objectives of the Federal Aviation Act and will not, as the *amicus curiae* suggests, undermine International Conventions to which the United States is a party or impair or jeopardize the aircraft finance industry.

A thorough examination of the legislative history reveals that the predecessor of Section 503 (which has been essentially unchanged since 1938) was enacted merely

to simplify the task of recording aircraft security interests. It was Congress' intent to leave the priority determinations and substantive validity of the purported interests to state law. This clear purpose, which is manifested by the legislative hearings and revisions Congress made to early versions of the bill which was ultimately enacted, is further buttressed by comparing the Act to the Ship Mortgage Act. Unlike the Federal Aviation Act, the Ship Mortgage Act, which was enacted well before the first precursor of Section 503, is an example of a statute where Congress clearly preempted state law as to recording and priorities.

That Section 503 does not preempt state law as to determining the validity of conveyances is further demonstrated by Sections 501(f) and 506 of the Act. Those sections, on their face, and as shown in the legislative history, limit the effect and scope of Section 503's recording requirement. Sections 501(f) and 506 clearly demonstrate that the central recording system established by Section 503 does not impact upon the substantive state law regarding the validity of the conveyance and priorities.

The facts of this case graphically demonstrate the ludicrous and irrational results which could result from the immutable application of Section 503 as proposed by the petitioners and *amicus curiae* which makes recording an absolute prerequisite in order to prevail against *any* subsequently recorded document. The Shackets were undeniably good faith purchasers of the aircraft who failed to promptly record their title to their aircraft as a result of a fraud perpetrated by the seller of the aircraft. In contrast, Philko, which held numerous intimate business relationships with the seller, entered into a

credit transaction with respect to the aircraft also as a result of the fraud of the seller of the aircraft. However, at the time of that credit transaction, the seller, under applicable state law, no longer held any interest in the aircraft and, accordingly, could not convey any ownership or security interest to anyone except another bona fide purchaser—something Philko was clearly not. Accordingly, since the documents recorded on behalf of Philko were unquestionably invalid, to divest the Shackets of their title and ownership rights to the aircraft in favor of Philko would be tantamount to the Court's endorsement of exalting form over substance.

Assuming, *arguendo,* that the Court accepts the construction of Section 503 urged by the petitioner and *amicus curiae,* the facts of this case nevertheless support an affirmance of the lower court's judgment in favor of the respondents. Section 503, by its express terms, does not apply to a party with an unrecorded interest as to any third party who records but had "actual notice" of the prior unrecorded interest. It is well-settled that under applicable state and federal law that "actual notice" includes circumstances which should have provoked further inquiry which would have revealed the prior conveyance. In the instant situation, the Record is replete with undisputed facts sufficient to have placed Philko on further inquiry. Thus, at least as to Philko, the Shackets' interest is superior even though unrecorded by virtue of Philko's actual notice thereof.

Lastly, the express and implied arguments by both the petitioner and the *amicus curiae* that aircraft financing will become difficult to obtain unless Section 503 is construed as a total and absolute preemption of state law with

respect to determining ownership rights and priorities of unrecorded conveyances cannot withstand an objective analysis. Essentially, their position is that if lenders must look to each state to determine substantive validity regarding titles and priorities then the difficulty involved in financing aircraft will increase as will the lenders' risk. This argument is superficial and is flawed for at least three reasons.

First, it ignores the undisputed choice of law directive provided in Section 506 which eliminates any uncertainty as to the appropriate state law which will govern. Secondly, all but one state[3] and the District of Columbia have adopted the relevant sections of the Uniform Commercial Code, eliminating the alleged burden and difficulty for the lenders to learn all fifty states' priority laws. Finally, no reason has been suggested to justify relieving the lenders of a "burden" which they routinely confront with respect to financing other expensive personal property needed by businesses such as construction equipment, machine tools and the myriad of other large equipment items financed by banks and other financial institutions.

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[3] Louisiana, of course, has still failed to adopt any provisions of Article Two.

ARGUMENT

I. THE FEDERAL AVIATION ACT DOES NOT PREEMPT STATE LAW RELATING TO OWNERSHIP RIGHTS AND OTHER PROPERTY INTERESTS IN AIRCRAFT OR THEIR RELATIVE PRIORITIES.

A. The Relevant Statutory Language Of The Act Is Consistent With Limiting The Preemptive Effect To State Recording Laws.

This case presents the question of whether precise and established principles of state property rights should give way to an ambiguous federal statute which does no more than provide a national repository for recording interests in aircraft. The facts here bring sharply into focus the tension between the prior purchase in good faith by a consumer with incontestable state property rights and a later purchase by a merchant without any valid state interest who seeks to extinguish all prior rights by a recording under the federal provision.

Section 503 of the Federal Aviation Act, 49 U.S.C. §1403 (hereinafter referred to as "Act") does preempt state recording laws with respect to aircraft. Such limited preemptive effect has not been seriously challenged by the lower courts.[4] Indeed, the undisputed

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[4] *See, e.g., Gary Aircraft Corp.* v. *General Dynamics Corp.*, 681 F.2d 365, 368 (5th Cir. 1982); *Texas National Bank* v. *Aufderheide*, 235 F. Supp. 599, 603 (E.D.Ark. 1964). *See generally* Annot., *Construction & Effect of 49 U.S. Code §1403, Governing Recordation of Ownership, Conveyances, and Encumbrances on Aircraft*, 22 A.L.R. 3d 1270.

goal of establishing a central federal recording system could not be achieved if state recording statutes were allowed to compete. What the Act does not do, however, is preempt state law with respect to the substantive validity of the instruments recorded or determine priorities between ownership claims.

Preemption is disfavored for the Supremacy Clause only requires state law to be subordinated if it directly conflicts with a federal statute, frustrates a federal scheme, Congress has unmistakably so ordained, or the nature of the regulated matter permits no other conclusion. *See Chicago & Northwestern Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978); *Florida Lime & Avocado Growers, Inc.* v. *Paul.*, 373 U.S. 132, 146 (1963). The pertinent statutory language is incurably ambiguous, and cannot be read to mandate preemption of any state laws except those which directly relate to recording conveyances of aircraft. Sections 503(c) and (d) merely provide that:

> (c) No conveyance or instrument the recording of which is provided for by section 503(a) shall be valid in respect of such aircraft . . . against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation . . .
>
> (d) Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation. . . .

49 U.S.C. §1403(c), (d).

The phrase in Section 503, "shall be valid . . ." simply does not speak to priorities. To the contrary, none of the Act's provisions require that recorded interests, however frail, shall be superior to prior valid interests recorded subsequently. In the most recent decision to comprehensively examine the effect of this statutory language, *Gary Aircraft Corp.* v. *General Dynamics Corp.*, 681 F.2d 365 (5th Cir. 1982), the Court of Appeals for the Fifth Circuit concluded that the statute did not preempt state law regarding priorities. The studious and cogent analysis of the statute by Judge Wisdom in that decision confirms the persuasive conclusions.

> Subsections 503(c) and (d) provide that no instrument shall be valid (except against the parties to the instrument and parties with actual knowledge) until filed and that, once filed with the Federal Aviation Administration, all instruments shall be "valid" without further recordation. But "validity" need not establish priority. On the contrary, it may mean nothing more than that recordation with the FAA will assure the instrument such "validity" as state law grants a recorded instrument. As the district court noted, if the term "valid" refers to enforceability, a literal interpretation of the language would lead to irrational results—one could create an enforceable interest in an aircraft without giving any value simply by recording it with the FAA. Still, we could read the statute as giving "validity" in the sense of priority to recorded interests *otherwise* "valid" under state law—that is, "valid" in the sense of complying with formalities and requirements of consideration.

Id. at 370-71 (emphasis original, footnote omitted). Judge Wisdom further explained that:

> [S]ection 503 makes *every* recorded interest "valid" against *all* persons; if "valid" means enforceable, section 503 makes all recorded interests enforceable against all other recorded interests—a logical impossibility for a priority system. Only by assuming the conclusion can one make section 503 a system according priority to recorded interests in order of time of filing.

Id. at 371, n. 9 (emphasis original).

While the facts in *Gary Aircraft* address a subsequent unrecorded interest and not a prior one as in this case, its convincing logic is no less applicable. In fact, the absence of preemption of state substantive law based on the language of the statute, in the case of a prior unrecorded interest, is even stronger since Section 503(c) states that an instrument shall not be valid against third parties *"until"* it is filed, not that it can never be.[5] In short, the Act simply cannot be logically interpreted as addressing priorities or the substantive validity of conveyances. Thus, the petitioner's opening argument that an irreconcilable conflict exists between Section 503 and Section 2-401 of the Uniform Commercial Code (Brief For The Petitioner, pp. 13-14) falls since it is predicated upon the erroneous assumption that Section 503 affirmatively creates an interest to third parties simply because of the failure of the parties to a conveyance to record.

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[5] The Shackets, of course, have not been able to record their interest despite efforts to do so because Smith fraudulently gave the original bills of sale to the Bank which recorded them. It was because of their inability to record with the FAA's central registry that the Shackets initiated this declaratory judgment action. 497 F. Supp. at 1264.

In contrast to the Federal Aviation Act, the Ship Mortgage Act of 1920, 46 U.S.C. §§911-984 ("SMA"), exemplifies an act which, by its unmistakable language, preempts state law as to recording *and* priorities. Significantly, Section 921(a) of the SMA contains some language similar to that in Section 503, as follows:

> (a) No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, includes a vessel of the United States . . . shall be valid, in respect to such vessel, against any person other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is recorded . . .

Unlike the Federal Aviation Act, however, the SMA includes several additional provisions which do address the substantive priority of the interests recorded. For instance, Section 922 of the SMA defines a "preferred mortgage" and Sections 924 and 953(a) speak in terms of "prior and subsequent" liens. Finally, Section 953(b) of the SMA expressly defines the priority accorded to preferred mortgages.

The Federal Aviation Act, on the other hand, not only lacks provisions explicitly granting priorities comparable to those in the earlier SMA[6] but contains sections which

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[6] The Act does recognize one priority regarding the so-called "basket lien"—a lien over stocks of spare parts maintained for installation in aircraft, 49 U.S.C. §1403(a)(3)—by providing that a recorded interest in a specific engine shall have priority over both prior and subsequent recorded backet liens. 49 U.S.C. §1403(d). However, as Judge Wisdom noted in *Gary Aircraft*, the use of this specific language to cover this unique circumstance does not mean Congress was legislating an

indicate that the scope of its recording provisions is narrow and finite.[7] As the Seventh Circuit pointed out in its decision below,[8] those limiting provisions are found in Sections 501(f) and 506. Section 501(f) specifically states that the certificate of registration which is required in order to operate an aircraft "shall not be evidence of ownership of the aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue". 49 U.S.C. §1401(f).

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[6] (Continued)
entire set of priority rules to cover all interests. 681 F.2d at 371. Indeed, "this special case could just as readily suggest that Congress meant to leave other priority rules unchanged—that is, they are left to state law". *Id.* (footnote omitted).

[7] That Congress intended the SMA to be a more pervasive statute is not surprising in light of the historical role the federal government has taken in the maritime area as a result of the constitutional provision that the "judicial power" of the United States extends to "all cases of admiralty and maritime jurisdiction". U.S. Const. art. III, §2. *See generally* Sigman, *The Wild Blue Yonder: Interests in Aircraft Under Our Federal System*, 46 S. Cal. L. Rev. 316, 328 (1973). Thus, the ownership and registration of ships have traditionally been national in character. While there has been national interest in aviation safety and commerce, it has not extended to ownership matters.

[8] Contrary to the *amicus curiae's* statement that the Seventh Circuit "completely failed to consider the application of Section 503(c) of the Act" (Brief of Amicus Curiae, p. 7), the court did consider and examine Section 503(c). Moreover, the court correctly recognized that that provision had to be read in conjunction with Sections 501(f) and 506, which limit the preemptive effect of 503(c) to recording. 681 F.2d at 510.

Similarly, Section 506 enervates the petitioner's argument that the scope of Section 503's preemption reaches the substantive validity of the interest recorded providing:

> The validity of any instrument the recording of which is provided for by section 1403 [503] of this title shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified therein it shall constitute presumptive evidence that such instrument was delivered at the place so specified.

49 U.S.C. §1406. Section 506 unmistakably is a choice of law provision with respect to the substantive validity of the instruments recorded under Section 503. Yet, it would turn the statutory scheme on its head to have a forum selection statute for the "form" of the instrument only, if all other substantive aspects of the conveyance are controlled by federal law. Rather, the only reasonable construction is that Section 506 provides the appropriate state law to be applied to all substantive aspects governing the ownership interests and priorities relating to the conveyances in aircraft other than the actual recording.

Any remaining doubt as to the limited preemptive effect of Section 503 is eliminated by the regulations promulgated by the Federal Aviation Administration. Regulation 49.17 states, in pertinent part, as follows:

> The recording of a conveyance is not a decision of the FAA that the instrument does, in fact, affect title to, or an interest in, the aircraft or other property it covers.

14 C.F.R. §49.17(c). *See also* 14 C.F.R. §47.5(c).[9] The agency entrusted with the responsibility of administrating the Act, therefore, has unequivocally interpreted the Act as not affecting state law governing title and ownership. This regulation, while perhaps in the nature of an "interpretative rule" as opposed to a "legislative rule",[10] is nonetheless entitled to great weight as the administering agency's concrete application of the statute and should not be disturbed absent compelling reasons. *See Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948); *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378 (1931). Further, because federal regulations have no less preemptive effect than federal statutes,[11] the logical corollary to this precept is that where

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[9] Regulation 47.5(c), dealing with the registration of aircraft, provides as follows:

> Section 501(f) of the Act (49 U.S.C. 1401 (f)) provides that registration is not evidence of ownership of aircraft in any proceeding in which ownership by a particular person is in issue. The FAA does not issue any certificate of ownership or endorse any information with respect to ownership on a Certificate of Aircraft Registration. The FAA issues a Certificate of Aircraft Registration to the person who appears to be the owner on the basis of the evidence of ownership submitted pursuant to §47.11 with the Application for Aircraft Registration, or recorded at the FAA Aircraft Registry.

[10] *See Batterton* v. *Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980).

[11] *Fidelity Federal Savings & Loan Association* v. *De La Cuesta*, 102 S.Ct. 3014, 3022 (1982).

a regulation plainly shows that state law is not preempted, as here, the regulation should be accorded equal standing as the statute.

In sum, the Act does not explicitly — nor implicitly, except in a most strained and ambiguous way — manifest an intent by Congress to preempt the state law as to the substantive validity of the conveyances recorded. Accordingly, if under controlling state substantive law the recorded conveyance is void,[12] the fact that it is recorded does not resurrect the purported interest in the aircraft.

B. The Legislative History Of Sections 503 and 506 Demonstrates That State Substantive Law Was Not Preempted As To The Validity Of Conveyances Recorded Under The Act And Priorities.

The legislative history of the 1958 Act is of limited assistance in discerning the Congressional intent since both the registration and recording provisions of its forerunner, the Civil Aeronautics Act of 1938 ("CAA"), were enacted virtually unchanged. S. Rep. No. 1811, 85th Cong., 2d Sess. (1958); H.R. Rep. No. 2360, 85th Cong., 2d Sess. 15 (1958), *reprinted in* 1958 U.S. Code Cong. & Ad. News, 3741, 3755. *See also* Staff of Senate Committee on Interstate & Foreign Commerce, 85th Cong. 2d Sess., Comparative Print Showing Differences Between The Civil Aeronautics Act of 1938 and the Federal Aviation Act of 1958, 51-54 (Comm. Print. 1958). Accordingly, the legislative history of the CAA must be examined to ascertain the objectives underlying the establishment of a central federal recording system.

The Congressional reports and hearings of the 1938 Act disclose that the recording provisions of the CAA were

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[12] *See* pages 28 to 30 *infra*.

not subject to material controversy or extended discussion. *See* H.R. Rep. No. 2254, 75th Cong. 3d Sess. (1938); S. Rep. No. 1661, 75th Cong. 3d Sess. (1938); H.R. Rep. No. 2635, 75th Cong. 3d Sess. (1938) (Conference Report); *To Create A Civil Aeronautics Authority, 1938: Hearing on H.R. 9738 Before The Committee On Interstate And Foreign Commerce*, 75th Cong. 3d Sess. 405-407 (1938) (statement of Fred D. Fagg, Jr., Director of Air Commerce, Dept. of Commerce). Nonetheless, those reports and hearings do manifest that the purpose of establishing the central recording system was to prevent and eliminate confusion engendered by a multitude of state recording systems, not to establish the substantive validity of recorded conveyances or accord priority to recorded interests over all subsequent claims. *Id.* Indeed, the Senate version of the House Bill ultimately enacted as the predecessor to Section 503 was amended to delete language which would have specifically granted recorded instruments priority. 83 Cong. Rec. 6757 (1938).

Similarly, the legislative history to Section 506, added in 1964, reinforces the conclusion that the recording provisions of this Act do not preempt state law except as to recording laws.[13] Both the Senate and House Reports describe the purposes of Section 506 as follows:

> The principal purpose of the legislation is to establish a uniform Federal rule *as to which State law is applicable to a conveyance*, lease, or other transfer of title or interest in any aircraft or aircraft part

[13] Unlike the petitioner, respondents do not address the 1948 or 1959 Amendments since they do not shed light upon the relevant issues and were enacted primarily to accomodate technological advances in aircraft. *See* S. Rep. 1362 80th Cong., 2d Sess. (1948); H.R. Rep. No. 445, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code & Cong. Ad. News, 1762; S. Rep. No. 221, 86th Cong. 1st Sess. (1959).

> which may be recorded under section 503 of the Federal Aviation Act.

H.R. Rep. No. 1033, 88th Cong., 1st Sess. 1 (1964) (emphasis added).

> The bill would create a uniform Federal rule which would provide that *the validity of certain instruments affecting title to or interest in aircraft shall be governed by the laws of the State,* District of Columbia, territory or possession in which they are delivered.
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> • • •
>
> [U]nnecessary and costly procedures which one must now go through to determine the validity of aircraft instruments would be remedied by this legislation. The bill selects and the committee is convinced, most logically, the place where the instrument is delivered. Consequently, the prospective purchaser would not only be able to readily ascertain whether encumbrances are recorded against an aircraft but would in addition be in the position to assess the validity of any instruments affecting the aircraft's title *by simply consulting the law of the place where the instruments were delivered.*

S. Rep. No. 1060, 88th Cong. 2d Sess., 1-3 (1964), *reprinted in* 1964 U.S. Code & Cong. Ad. News 2319, 2319-2321 (emphasis added).

Section 506 was clearly designed to be, and is, a choice of law provision. Even the petitioner recognizes Section 506 as such (Brief For The Petitioner, p. 24). Despite its concession that Section 506 requires state law to govern the validity of the conveyance, however, the petitioner concludes:

> It therefore follows that as between two parties acting in good faith and who have no notice of one another's transaction with respect to a single aircraft, the party who received delivery of *validly executed* instruments of conveyance must prevail upon the

> filing of those instruments with the FAA's central registry.

(Brief For The Petitioner, p. 24) (emphasis added). Apparently, the petitioner is of the view that if a document, purporting to represent an interest in an aircraft, is *executed* according to state law it is, without more, a "valid interest". That position does not square with common sense or legal standards since a document validly executed cannot breathe life into an otherwise dead letter.

Petitioner's view of the import of Section 506 is also at odds with the interpretation of its sponsors and draftsmen. The testimony of the Congressional hearings held in connection with the 1964 Amendment, indicates that the sole purpose of Section 506 was to direct interested parties to the applicable state law regarding the form of the instrument. *A Bill To Amend Section 503 Of The Federal Aviation Act: Hearing Before A Subcommittee Of The Committee On Interstate And Foreign Commerce,* 88th Cong., 1st Sess. (1963). It was not, in any manner, designed to preempt state law as to the validity of ownership interests or the relative priorities purported to be conveyed by the instrument. During the hearings[14] the sponsors of the new legislation, in response to direct inquiries, interpreted the provision as having no impact upon priorities or other substantive rights relating to the recorded instruments.

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[14] The actual colloquy from the hearings was as follows:

> Mr. Springer: . . . I just want to be sure that somebody who has physical possession of the aircraft and has really a legitimate lien under that State in the nature, we will say, of a tax lien, that we have not bargained away his right.
>
> Mr. Hill: Well, we certainly did not intend to. . .
>
> • • •

In light of this compelling evidence in its legislative history that Congress intended the preemptive scope of Section 503 to be confined to recording, it is telling that, in those decisions holding that state substantive law is also preempted, either the decision predated the enactment of Section 506 or the court did not examine the legislative history. *See,e.g., Sun Bank* v. *Snell* (*In re Cone*), 11 B.R. 925 (M.D. Fla. 1981); *Marsden* v. *Southern Flight Service, Inc.*, 227 F. Supp. 411 (M.D.N.C. 1961); *In re Veterans' Air Express Co.*, 76 F. Supp. 684 (D.N.J. 1948); *O'Neill* v. *Barnett Bank*, 360 So. 2d 150 (Fla. App. 1978); *Dowell* v. *Beech Acceptance Corp.*, 91 Cal. Rptr, 1, 476 P. 2d 401 (1970). In contrast, courts which have canvassed the legislative history have uniformly held that

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[14] (Continued)

Mr. Springer: Well, now if he is a creditor "shall be valid, in respect of the title or interest so transferred or created, as against all creditors."

Mr. Hill: That is the "validity" of the instrument. The instrument will be "valid" as against all creditors. It does not say he shall be prior to all other creditors.

Mr. Sibal: Will the gentleman yield?

Mr. Springer: Yes.

Mr. Sibal: It is not on the validity of it, it is the validity of substance of the two.

Mr. Hill: Yes; but not as to priority.

Mr. Springer: Now, is Mr. Calligar here?

Mr. Calligar: Yes.

Mr. Springer: How do you interpret this?

Mr. Calligar: Indeed, that provision does not go to priority as to creditors or lienors. That only goes to determine what law you look to to determine whether the instrument itself was a valid instrument. Priorities and precedents are under other bodies of law not involved with this legislation at all.

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preemption under the Act encompasses only state law recording statutes and does not affect state law determinations of ownership interests or priorities. *See, e.g.*, *Gary Aircraft Corp.* v. *General Dynamics Corp.*, 681 F.2d 365 (1982); *Danning* v. *Pacific Propeller* (*In re Holiday Airlines Corp.*), 620 F.2d 731 (9th Cir.), *cert. denied*, 449 U.S. 900 (1980); *Haynes* v. *General Electric Credit Corp.*, 432 F. Supp. 763 (W.D.Va. 1977), *aff'd*, 582 F.2d 869 (4th Cir. 1978); *Cessna Finance Corp.* v. *Skyways Enterprises, Inc.*, 580 S.W.2d 491 (Ky. 1979).

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[14] (Continued)

> Mr. Hill: I can say only, sir, that it is not intended to do that, and I don't think it does. It provides only the law which determines the validity of the instrument as an instrument and does not purport to determine its priority as against others.
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> Mr. Hill: That is correct.
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> Mr. Hemphill: But you are not saying that subsequent creditors and purchasers with value without notice cannot attack the lien priority, you are not saying that?
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> Mr. Hill: That is right. I don't say that. The bill does not say that.
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> • • •
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> Mr. Williams: Mr. Sibal.
>
> Mr. Sibal: Just to reaffirm my position. This is the question we have to resolve, apparently. This is the point that Mr. Springer raised, that this bill restricts itself to the validity of the instrument which is delivered. I mean it provides for a system of clarification of of [sic] this particular instrument. It does not go into its relationship of other instruments and other liens; is that correct?
>
> Mr. Hill: Yes; that is exactly correct.

A Bill To Amend Section 503 Of The Federal Aviation Act: Hearing Before A Subcommittee Of The Committee On Interstate And Foreign Commerce, 88th Cong., 1st Sess. 24-28 (1963).

II. UNDER STATE LAW PHILKO'S INTEREST, IF ANY, IN THE AIRCRAFT IS INFERIOR TO THAT OF THE SHACKETS.[15]

A. The Shackets Were Bona Fide Purchasers Of The Aircraft And Received Good Title.

The manner of registration and recording of the relevant instruments in this case are not contested and are presumed to have been carried out in accordance with the Act and the FAA's applicable regulations.[16] Similarly, the choice of law question, also controlled by the Act, is not an issue here since the bills of sale were undisputedly delivered in Illinois. Pursuant to Section 506, therefore, Illinois law is controlling as to the underlying validity and effect of the documents recorded by the Bank which purported to convey title in the aircraft to Philko and a security interest to the Bank.

Both the District Court and the Circuit Court unequivocally held that the facts of this case compelled a finding that the Shackets were good faith buyers in the ordinary course pursuant to Section 1-201(9) of the Illinois Uniform Commercial Code, Ill. Rev. Stat. §1-

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[15] Respondents are fully aware that the substantive rights to the aircraft acquired by the Shackets and Philko which would be accorded under state law is not an issue before the Court and that those relative rights were fully resolved in the lower courts. However, a brief discussion of those rights is useful to demonstrate the inappropriateness and unfairness that could result if the Court were to adopt the position urged by the petitioner which essentially exalts the form of the instrument conveying title over the substance of the underlying transaction.

[16] 14 C.F.R. §§47-49.

201(9) ("UCC")[17] and had given value under UCC Sections 1-201(32), (44), since they: (1) paid $126,000 in cash and turned over the possession of their trade-in aircraft; (2) purchased from a dealer in airplanes; (c) inquired of Clark, the franchisee, as to whether the sale could be consummated; and (d) obtained immediate possession of the aircraft. Under applicable state law, therefore, the Shackets, as bona fide purchasers of the plane for value, obtained good title to the aircraft from Smith Aircraft. 681 F.2d at 512.

B. Philko Was Not A Bona Fide Purchaser And Did Not Receive Title To The Aircraft.

Unlike the Shackets, who did receive good title from Smith Aircraft, the Seventh Circuit correctly held that Philko was not a bona fide purchaser and did not acquire title to the aircraft as a result of the purported second sale from Smith Aircraft. 681 F.2d at 512. The fact that Philko may have given value to Smith Air-

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[17] Illinois has adopted Articles 1 and 2 of the Uniform Commercial Code without any substantial changes. Section 1-201(9) provides as follows:

> (9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the good buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) as wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. "Buying" may be for cash or by exchange of other property or on documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

craft is not a sufficient reason to elevate it to the status of a bona fide purchaser. As the Seventh Circuit explained in its decision:

> "Buying" under UCC §1-201(9) specifically excludes transfers "as security for or in total or partial satisfaction of a money debt." Thus, a person may give "value" as defined in UCC §1-201(44) which specifically includes acquiring rights "as security for or in total or partial satisfaction of a pre-existing claim"), yet not be a "buyer" for purposes of UCC §1-201(9).

Id. Thus, because Smith Aircraft owed Philko $60,000 on its $80,000 loan and because Philko had no interest in the sales price to be paid by Krueger other than to repay the bank loan and the $60,000 loan balance, the Seventh Circuit held that Philko could not be a "buyer" in the ordinary course. *Id.*

Moreover, as the Seventh Circuit aptly noted, Philko's status as a good faith purchaser is not relevant to the dispositive issue of whether it received title to the aircraft. Judge Markey explained as follows:

> Whether Philko has the status of a good faith purchaser is of no consequence. Such status of itself cannot be the basis for good title in this case absent possession of the aircraft. At the time of the "sale" to Philko, Smith Aircraft had neither title to nor possession of the aircraft. Consequently, Philko could not under UCC §2-403(1) acquire good title from Smith Aircraft, whether any voidable title that may have arguably accrued to Smith Aircraft because it retained the title papers or otherwise.
>
> Accordingly, under state law, Philko acquired no title to the aircraft.

Id. (footnote omitted). Hence, petitioner's argument that a lender should be treated as a good faith purchaser (Brief For The Petitioner, pp. 33-34) is not only erroneous but irrelevant to whether Philko received title to the aircraft. Thus, notwithstanding Philko's wishes to the contrary, this is not a situation where there is a title dispute between two bona fide purchasers each having received a valid title, one of which recorded and one which did not. Irrespective of Philko's recordation of the "title papers", only the Shackets acquired a valid title to the aircraft from Smith Aircraft.

III. THE SHACKETS' UNRECORDED TITLE IS VALID AGAINST PHILKO BECAUSE PHILKO HAD ACTUAL NOTICE THEREOF.

Assuming, *arguendo,* that this Court adopts the position that Section 503 preempts state law not only for the registration and recordation of conveyances relating to aircraft but also as to the validity of title documents and respective property rights, the judgment in favor of the Shackets should be nevertheless affirmed. Section 503(c), by its express terms, recognizes the "validity" of an unrecorded interest as to "any person having actual notice thereof."

The so-called "actual notice" exception to Section 503 has been consistently construed to include not only actual knowledge of the unrecorded interest but also circumstances which should have provoked further investigation or inquiry. *See, e.g., Marsden* v. *Southern Flight Services, Inc.,* 227 F. Supp. 411, 416 (D.N.C. 1961); *Lochhead* v. *G.A.C. Finance Corp.,* 6 Ariz, App. 539, 434 P.2d 655, 658 (1967). In this case, Philko plainly had knowledge of events which, had Philko made minimal inquiry, would have led to the discovery of the prior conveyance by Smith Aircraft to the Shackets.[18]

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[18] The facts germane to this issue are not in dispute. Philko knew that Smith Aircraft did not have possession of the aircraft but made no inquiry to confirm Smith's representation as to the aircraft's whereabouts. 497 F. Supp. at 1265. McArdle also knew that Smith Aircraft was in a precarious financial situation since it had failed to repay Philko the $80,000 loan balance despite McArdle's pressure to do so and that its line of bank credit had reached its limit. Finally, McArdle knew that Smith had possession of the original bills of sale which was inconsistent with Smith's statement that the $152,000 he sought was needed to pay Clark the remaining sum due on the aircraft. *Id.*

In short, Philko, through McArdle, had actual knowledge of circumstances — lack of possession, financial difficulties, an inconsistency between Smith's representations and Smith's possession of the original bills of sale — which should have provoked further inquiry or investigation by Philko. The result of the investigation would have revealed Smith's scheme and would have prevented Philko's loss. The failure to undertake that investigation is equated to "actual notice" under Section 503 such that the Shackets' failure to record does not eliminate their superior ownership interest in the aircraft as to Philko.[19]

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[19] Although the lower courts did not reach the "actual notice" issue because the relevant facts were found not to be in dispute, respondents submit that this Court can find that Philko had "actual notice" of the Shackets' prior interest for purposes of Section 503 or, alternatively, at a minimum remand for a determination of "actual notice" by the lower courts.

IV. AFFIRMANCE OF THE SEVENTH CIRCUIT'S DECISION IN THIS CASE WILL NOT VIOLATE INTERNATIONAL CONVENTIONS OR ADVERSELY AFFECT THE AIRCRAFT FINANCING INDUSTRY.

A. The International Conventions Will Not Be Affected By Limiting The Preemptive Effect Of Section 503 To Recording Systems.

In its brief, the *amicus curiae* devotes inordinate discussion to the December 7, 1944 Convention on International Civil Aviation (the "Chicago Convention") and the 1948 Convention on the International Recognition of Rights in Aircraft (the "Mortgage Convention"), arguing that those Conventions require "a single federal recording system *to determine rights* in United States registered aircraft" (Brief For Amicus Curiae, pp. 20 to 25, emphasis added). Respondents submit that the Conventions require only that a national registration and recording system be established and not the eradication of state law to control substantive ownership rights. Accordingly, neither the objectives nor express provisions of the Conventions will be offended if Section 503's preemptive effect is restricted to recording aspects of aircraft rights, and not substantive ones.

The Mortgage Convention provides that:

> Nothing in this Convention shall prevent the recognition of any rights in aircraft under the law of any Contracting State.

Art. I, par. (2). This provision makes it clear that the existing substantive law of each Contracting State will control. Hence, to the extent that the determination of substantive rights of ownership in aircraft in a Contract-

ing State are governed by its territorial or political subdivisions the Convention does not require the Contracting State to adopt a uniform national law regarding substantive rights. This is further evidenced by the provisions of Article XVII of the Mortgage Convention, which provides as follows:

> If a separate register of aircraft for purposes of nationality is maintained in any territory for whose foreign relations a Contracting State is responsible, references in this Convention to the law of the Contracting State shall be construed as references to the law of that territory.

It is certainly no more of a burden or hardship on the members of the Conventions to examine each territory's separate law than it is to examine the separate laws of the states. Indeed, it is less so since Article XVII contemplates separate registries for each territory whereas the United States has one national registry by virtue of Section 501.

The Mortgage Convention's policy as to the effect of recordation on third parties is also perfectly consistent with a narrow interpretation of the preemptive effect of Section 503. Paragraph 2 of Article II states that:

> [T]he effects of the recording of any right mentioned in Article I, paragraph (1), with regard to third parties shall be determined according to the law of the Contracting State where it is recorded.

Nowhere in the Conventions' preambles or bodies is there the slightest suggestion that if the "law of the Contracting State" determines third parties' rights by looking to its political or territorial subdivisions, then paragraph 2 of Article II is no longer applicable. Congress was

cognizant of this fact in 1964, when it enacted Section 506,[20] since this amendment specifically provided that this choice of law provision would not affect the Mortgage Convention. 1964 Cong. Rec. 14523-14524.

B. The Aircraft Financing Industry Will Not Be Adversely Affected If State Law Controls The Substantive Validity Of Title And Ownership Rights.

The banks, financial institutions, and other lenders which are regularly engaged in financial aircraft purchases will not suffer any harm should this Court affirm the Court of Appeals in this case holding that the Act does not preempt state law as to the validity of titles and priorities of interests in aircraft. Lenders are fully accustomed to looking to state law in financing virtually all types of personal property many of which are also costly and mobile, from jewelry and mobile homes to construction equipment. Moreover, the burden of examining the law of each state, as exaggerated by petitioner and *amicus curiae,* has been substantially eliminated since every state but one has adopted all or substantially all of the Uniform Commercial Code.

Additionally, the lenders' risk of the so-called "hidden interest" of a prior unrecorded bona fide purchaser is no greater than that which exists as to the possibility that tax liens have been filed on the aircraft by the Internal Revenue Service. Under Regulation 49.17(a), 14 C.F.R.

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[20] Significantly, the *amicus curiae* does not attempt to reconcile the clear dictates of Section 506, which looks to state law, with its contention that the International Conventions require an absolute uniform federal law as to all aspects of recordation and rights in aircraft.

§49.17(a), federal tax liens need not be filed with the FAA. Thus, because the Service's practice is to file only with state authorities, it is necessary to review all fifty state records for possible tax liens. *See CIM International* v. *United States,* 641 F.2d 671, 673 n.2 (9th Cir. 1980).

Finally, it is noteworthy that the failsafe assurance of the FAA registry which the Aircraft Finance Association and other lenders seek is a practical impossibility, as the facts of this case amply demonstrate. The Shackets' closing took place on April 18 and the purported sale to Philko only six days later, on the 24th. The Bank conducted a title search on April 21, only three days following the Shackets' closing. Accordingly, even if the Shackets had been given proper bills of sale which they could have recorded, there was not an adequate interval such that the Bank would have learned of the Shackets' title. This is evidenced by the time required by the Bank to record its purported interest in May. The Bank mailed the bills of sale on May 25[21] and they were filed on May 31.[22] Further, the recordation process itself was not completed until June 13.[23]

Accordingly, even if the Shackets had mailed instruments for recordation the very day following the closing,

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[21] Regulation 49.11, 14 C.F.R. §49.11 requires conveyances to be recorded to be mailed to or delivered to the FAA Aircraft Registry in Oklahoma City, Oklahoma.

[22] Under Regulation 49.19 the effective date of filing for recordations is the date it is received by the FAA Aircraft Registry. 14 C.F.R. §49.19.

[23] The Bank representative, Richard Andrews, testified that the recordation process often takes as long as three to five weeks. (R. RA Dep. 114)

on April 19, it is likely that the instruments would not have been filed by April 21, the day the Bank conducted the search of the registry. The Bank made no subsequent checks of the registry prior to the purported second sale on April 24.[24] Thus, the fraud perpetrated by Smith Aircraft would have been successful even if the Shackets had promptly complied with the recording regulations.

[24] R. RA Dep. 109-110, 129-130.

CONCLUSION

The facts in this case poignantly illustrate the inequitable consequences which could result if Section 503 preempts state substantive law. Indeed, it is incongruous that the petitioner adopts the position it does in this case in light of its close relationship with the seller who defrauded both it and the respondents. In contrast, the respondents were bona fide purchasers of the aircraft who were unknowingly deceived and defrauded by the seller.

Notwithstanding the parade of imaginary horribles which the petitioner and *amicus curiae* suggest will result unless Section 503 is interpreted as totally preempting state law, the Federal Aviation Act simply was not designed to supplant state law regarding ownership and lienhold interests in aircraft. In fact, the interpretation of Section 503 which the petitioner and *amicus curiae* propose would engender confusion and chaos since the Act does not contain the guidelines necessary to choose between competing interests in aircraft. Clearly, Congress has the power to supplant state law on this subject but to conclude that it has done so on such a frail reed as exists in this case cannot be reconciled with the traditional doctrine of preemption.

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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